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No. 00-361

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARGARET K. MICHAELS,

Petitioner,

v.

GEORGE McGRATH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS GEORGE McGRATH AND RICHARD MASTROANGELO

ROBERT C. SCRIVO
Counsel of Record
RICHARD M. SIEGEL
Acting Essex County Counsel
Office of the Essex County Counsel
Hall of Records, Room 530
465 Dr. Martin Luther King Jr. Blvd.
Newark, New Jersey 07102
(973) 621-2701

Attorneys for Respondents George McGrath and Richard Mastroangelo

162981

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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REASONS FOR DENYING THE WRIT

The questions presented in sequence by this matter are as follows: one, whether Essex County Prosecutor's Office Investigators George McGrath's and Richard Mastroangelo's (hereinafter "Respondents") participation in the investigation of Petitioner, which consisted of interviewing adolescent victims of sexual abuse, deprived Petitioner of a constitutional right; two, whether the use of the investigation at her trial deprived Petitioner of a constitutional right; and three, whether Respondents' interviewing techniques violated clearly established rules at the time of the investigation as to negate Respondents' qualified immunity. While stated differently, the Petitioner's "question presented" acknowledges the second issue, but overlooks the first and third. Pet. at i.

Petitioner argues that the decision below leaves an entire class of criminal defendants without the benefit of § 1983 redress by finding that constitutionally protected rights do not exist when improperly obtained statements are used against them in a criminal prosecution. Pet. at 8. In support of this argument, Petitioner advocates that this Court adopt the "but for" causation analysis contained in the dissenting opinion of *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085, 115 S. Ct. 740, 130 L. Ed. 2d 642 (1995). Pet. at 8, 9, 10. The Petitioner maintains that not only are the *Buckley* majority and dissent in conflict but that the majority is inconsistent with the broad scope of civil remedies intended by § 1983. Pet. at 7. The Petitioner contends that *Buckley* is inconsistent with *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997) and that *Clanton* is inconsistent with the Third Circuit opinion below. Pet. at 7, 9.

Respondents' investigation techniques neither implicated nor violated Petitioner's constitutional rights. Pet., App. 12. Assistant Prosecutor Sara Sencer-McArdle is entitled to absolute immunity in offering the testimony at grand jury and trial. Pet., App. 12. Respondents are entitled to qualified immunity for their participation in the investigation. Pet., App. 12. Even assuming Petitioner's constitutional rights were impeded, she cannot show that Respondents violated clearly established statutory or constitutional rights which a reasonable person would have known, necessary to negate Respondents' qualified immunity. *Michaels v. New Jersey*, 50 F. Supp. 2d 353, 365 (D.N.J. 1999). The Petitioner's proposed but for causation analysis violates the long established principals of absolute prosecutorial immunity and qualified immunity for law enforcement officers. Moreover, *Buckley* and *Clanton* are reconcilable with the Third Circuit decision below. The Third Circuit's ruling was proper in all respects and Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I.

PETITIONER'S CONSTITUTIONAL RIGHTS WERE NOT IMPLICATED BY RESPONDENTS' INTERROGATION OF THE VICTIMS

The Third Circuit opinion upheld the District Court's decision which determined that Petitioner could not demonstrate a violation of her constitutional rights by Respondents' alleged improper interviewing techniques of the victims. Pet., App. 12. That is because rights personal to their holders may not be enforced by third parties. *Warth v. Seldin*, 422 U.S. 490, 498-502, 509-510, 95 S. Ct. 2197,

2204-2207, 2210-2211, 45 L. Ed. 2d 343, 354-356, 360-361 (1975). This issue is one of standing which involves two inquiries: first, whether the proponent of a particular legal right has asserted an "injury in fact", and second, whether the proponent has alleged that his own legal rights were infringed rather than basing his claim for relief upon third parties. *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S. Ct. 2868, 2873, 49 L. Ed. 2d 826, 832 (1976). In the Fourth Amendment context, standing turns on whether an individual maintains a legitimate expectation of privacy in the place searched or item seized. *Katz v. United States*, 389 U.S. 347, 353, 88 S. Ct. 507, 512, 19 L. Ed. 2d 576, 583 (1967). *See also United States v. Payner*, 447 U.S. 727, 100 S. Ct. 2439, 65 L. Ed. 2d 468 (1980) (defendant charged with falsifying federal income tax return by denying that he maintained a foreign bank account lacked legitimate expectation of privacy under the Fourth Amendment to challenge admission of documents illegally seized from another which showed defendant's ownership interest in such an account).

At the investigation stage, Respondents' interrogation techniques did not violate Petitioner's constitutional rights, but only, perhaps, the rights of the child victims being interviewed. *Michaels*, 50 F. Supp. 2d at 363; *citing Buckley*, 20 F.3d at 794-795. The *Buckley* reasoning, which was relied upon heavily by the Third Circuit herein, presented the following hypothetical to synthesize this issue:

> Let us suppose the prosecutors put Cruz on the rack, tortured him until he named Buckley as his confederate, and then put the transcript in the drawer, or framed it and hung it on the wall but took no other step, or began a prosecution but did

> not introduce the statement. Could Buckley collect damages under the Constitution? Surely not; Cruz himself would be the only victim.

Buckley, 20 F.3d at 795. Indeed, inappropriate interviewing tactics potentially violate the rights of the person interrogated, not third parties. *Id.* Here, Petitioner does not seek relief from the interrogation of herself, only the child victims. As such, Petitioner lacks standing to assert a constitutional claim.

II.

THE USE OF RESPONDENTS' INVESTIGATION AT PETITIONER'S TRIAL IS SHIELDED BY ABSOLUTE PROSECUTORIAL IMMUNITY

The use of the pre-indictment investigation, in the form of the victims' testimony at trial, may have implicated Petitioner's constitutional rights. *Michaels*, 50 F. Supp. 2d at 363. That use, however, was found by both the District and Third Circuit Courts to be shielded by absolute prosecutorial immunity for Assistant Prosecutor, Sara Sencer-McArdle. Pet., App. 12. Absolute immunity exists for officers who perform judicial or quasi-judicial functions such as initiating a prosecution, preparing for trial and presenting the State's case. *Imbler v. Pachtman*, 424 U.S. 409, 420, 96 S. Ct. 984, 990 47 L. Ed. 2d 128, 137-138 (1976).

The Third Circuit Court upheld the District Court's ruling which stated that the Respondent investigators' participation in the investigation of Petitioner is protected by qualified immunity. Pet., App. 12. Qualified immunity

applies to government officials, such as law enforcement officers, performing discretionary functions. *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S. Ct. 2727, 2739, 73 L. Ed. 2d 396, 409 (1982). It shields law enforcement officers from liability unless they "violate clearly established statutory or constitutional rights which a reasonable person would have known." *Harlow*, 437 U.S. at 818, 102 S. Ct. at 2738, 73 L. Ed. 2d at 410-411. Since the Respondents' investigation did not violate Petitioner's constitutional rights, their entitlement to qualified immunity must be left undisturbed.

Petitioner does not challenge the qualified immunity granted Respondents in the decision below. Rather, she argues that the Third Circuit decision leaves an entire class of criminal defendants without the benefit of § 1983 redress by finding that constitutionally protected rights do not exist when improperly obtained statements of third parties are used against them in a criminal prosecution. Pet. at 7. While the Court of Appeals' decision left Petitioner without § 1983 civil recourse, Petitioner does have an active common law malicious prosecution claim in the New Jersey State Court. *Michaels*, 50 F. Supp. 2d at 366-367. Like the Seventh Circuit in *Buckley*, the Third Circuit herein recognized the unavailability of § 1983 recourse, but relying on *Imbler*, concluded that the policies served by absolute prosecutorial immunity outweighed the lack of § 1983 redress. Pet., App. 9, 10. Amongst other policy reasons, the *Imbler* Court stated the "public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler*, 424 U.S. at 424-425, 96 S. Ct. at 992-993, 47 L. Ed. 2d at 139-141. The Third Circuit correctly reasoned that the criminal justice system provides

its own remedies to thwart the apparent harm visited upon those wrongfully convicted. Pet., App. 10. Those remedies include probable cause hearings, dismissal of criminal charges and the state Rules of Professional Conduct. *See Kulwicki v. Dawson*, 969 F.2d 1454, 1464 (3d Cir. 1992). The Third Circuit is rightly convinced that the above remedies are sufficient to discourage prosecutors from coercing witnesses to make unreliable statements against a criminal defendant. Pet., App. 10. Deterrence of future abuses of power by individuals acting under color of state law is an important purpose of § 1983. *City of Newport v. Fact Concerts, Inc., R.I.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). As such, civil recourse is not the only goal of § 1983 as Petitioner's argument suggests.

III.

ASSUMING ARGUENDO THAT PETITIONER'S CONSTITUTIONAL RIGHTS WERE INFRINGED, IT CANNOT BE SHOWN THAT RESPONDENTS VIOLATED CLEARLY ESTABLISHED LAWS AT THE TIME OF THE INVESTIGATION

In the instant matter, Petitioner's conviction was overturned by the Superior Court of New Jersey, Appellate Division and affirmed by its Supreme Court which deemed the victims' statements unreliable due to improper interrogation techniques. *State v. Michaels*, 264 N.J. Super. 579 (App. Div. 1993); *State v. Michaels*, 136 N.J. 299 (1994). Subsequently, the Essex County Prosecutor's Office administratively dismissed the charges. *Michaels*, 50 F. Supp. 2d at 357. The Court decisions, which gained national recognition, were sufficient to ensure that prosecutors of sexual offenses refrain from overzealous interrogation

tactics. In fact, petitioner's criminal case inspired a change in the law. *Michaels*, 50 F. Supp. 2d at 364-365. *See Karol L. Ross, State v. Michaels: A New Jersey Supreme Court Ruling With National Implications*, 78 Mich. B.J. 32, 32 (1999) ("*Michaels* is one of the first cases that attempts to resolve the issue of the reliability of testimony of the alleged child abuse victim, thus filling an important void").

The Third Circuit left undisturbed the District Court's ruling that the Respondents' techniques used to interview the victims during the course of the investigation did not violate Petitioner's rights. Pet., App. 12. Nevertheless, the District Court entertained the hypothetical that Respondents violated Petitioner's rights to determine whether those rights were clearly established at the time of the investigation. *Michaels*, 50 F. Supp. 2d 353, 363-366. The District Court framed the issue as follows: "in 1985, did the defendants' interrogation violate 'constitutional standards protecting accused persons from suggestive or coercive interrogation of witnesses and victims'." *Id.* at 364. The District Court engaged in an exhaustive analysis from a legal and psychological standpoint to ascertain the accepted protocols for investigating and interviewing adolescent victims of sexual abuse. *Id.* at 363-365. The District Court correctly ruled that Petitioner "utterly failed to establish that the contours of that right were clearly established at the time of the violation, nor has she demonstrated that defendants acted unreasonably in light of what limited knowledge they had." *Id.* at 365-366. Because the Third Circuit concluded that the Respondents' questioning of the children did not violate Petitioner's constitutional rights, it never addressed this issue. Pet., App. 12.

The Petition fails to address whether Respondents' investigation violated clearly established statutory or constitutional rights which a reasonable person would have known. Thus, this Court must consider this issue abandoned by Petitioner.

IV.

THE BUT FOR CAUSATION ANALYSIS PROPOSED BY THE BUCKLEY DISSENT IS WITHOUT MERIT

Petitioner urges this Court to adopt the but for causation analysis suggested in the dissenting opinion in *Buckley* to resolve the qualified immunity issue. *Buckley*, 20 F.3d at 800 (Fairchild, J., dissenting). Pet. at 8. That dissent proposed that prosecutors would not be immune from liability for their non-advocacy wrongful conduct if a plaintiff could demonstrate that an indictment and trial would not have occurred but for the wrongful conduct. *Id.* Conveniently, Petitioner submits that her indictment and trial would not have occurred but for Respondents' unlawful conduct. Neither federal court decision below, nor Petitioner's State court criminal proceedings came to such a conclusion. Pet. at 10.

This Court, like the District Court and Third Circuit Court below, must reject Petitioner's invitation to accept the but for causation analysis proposed in the *Buckley* dissent. This Petition, like the Petition for Writ of Certiorari in *Buckley* must also be denied. Petitioner fails to support her argument with a single majority opinion which adopts the but for causation rationale. More than six years have elapsed since that dissent was authored and no court has embraced the idea. If accepted, that rationale would, potentially, erode

the long established principles of absolute prosecutorial immunity set forth in *Imbler*, *supra* and qualified immunity for law enforcement officers contained in *Harlow*, *supra*. Indeed, the but for causation approach would prevent the vigorous performance of a prosecutor's duty for fear of liability. *Imbler*, 424 U.S. at 424-25, 96 S. Ct. at 992-993, 47 L. Ed. 2d at 139-141.

V.

THE THIRD CIRCUIT OPINION IS CONSISTENT WITH *BUCKLEY* AND *CLANTON*

Petitioner maintains that the opinion below is inconsistent not only with the *Buckley* dissent but also with *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997). Pet. at 7. Petitioner argues that *Clanton* mandated that neither investigators nor prosecutors should be immune from liability for their role in obtaining improper statements. Pet. at 10.

Petitioner's argument that the Third Circuit opinion below is inconsistent with *Clanton* is unpersuasive. Pet. at 9. In fact, it misrepresents the *Buckley* and *Clanton* distinction. That distinction was accurately crystallized by the Third Circuit Court below:

> The distinction between *Buckley* and *Clanton* is the use of the improperly obtained statements. In *Buckley*, the witnesses' coerced testimony was presented at trial. The court held that the prosecutor was absolutely immune from an action for damages under § 1983 under *Imbler*. *See* 20 F.3d at 795. In *Clanton* on the other hand, the police used another person's coerced

confession in an affidavit to obtain an arrest warrant for Clanton. 129 F.3d at 1151. In using a coerced statement in this manner, the court held in *Clanton* that the officers were not entitled to qualified immunity. *See Id.* at 1159; see also *Malley v. Briggs*, 475 U.S. 335, 343 (1986) (holding that an officer applying for a warrant without probable cause may be entitled to qualified immunity but is not entitled to absolute immunity). Here, the only use of the improperly obtained statements against Michaels was the presentation of the children's testimony before the grand jury and at the criminal trial. Until the children testified against her, Michaels' constitutional right to due process was not violated by the techniques used to interview the children. Pet. App. 11, 12.

The Third Circuit opinion below is consistent with *Clanton*. In *Clanton*, the investigators were denied qualified immunity because they intentionally swore to the veracity of an informer's confession in support of an arrest warrant while knowing the confession was false. *Clanton*, 129 F.3d at 1154. That affidavit, coupled with its use to arrest plaintiff, was found to have violated plaintiff's clearly established Fourth Amendment rights. *Id.*

In the instant matter, the Respondent investigators did not use the fruits of their investigation to secure an arrest warrant for Petitioner. Rather, the Respondent prosecutor empaneled three grand juries to evaluate the proofs. Pet., App. 5, 6. If the Respondents sought an arrest warrant, they would have been granted qualified immunity subject to a finding that their investigation violated clearly established

principles which a reasonable person would have known. *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737 73 L. Ed. 2d at 409. Since the prosecutor presented the matter to the three grand juries she is entitled to absolute immunity for offering the victims' testimony in that capacity and at trial. *See Imbler*, 424 U.S. at 420, 96 S. Ct. at 990 47 L. Ed. 2d at 137-138.

After considering the relevant arguments and applicable law, the Third Circuit properly held that Petitioner did not demonstrate a violation of her constitutional rights when the Respondents employed improper interview techniques with the victims. Pet., App. 12. The Panel properly ruled that all Respondents were entitled to qualified immunity for their actions and that Assistant Prosecutor, Sara Sencer-McArdle was entitled to absolute immunity for offering the children's testimony before the grand jury and at trial. Pet., App. 12.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

ROBERT C. SCRIVO
Counsel of Record
RICHARD M. SIEGEL
Acting Essex County Counsel
Office of the Essex County Counsel
Hall of Records, Room 530
465 Dr. Martin Luther King Jr. Blvd.
Newark, New Jersey 07102
(973) 621-2701

Attorneys for Respondents
George McGrath and
Richard Mastroangelo